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In the Supreme Court of the United States

OCTOBER TERM, 1970

P. F. COLLIER & SON CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 427 F.2d 261. The orders and opinion of the Federal Trade Commission issued September 30, 1966 (J.A. 64-87), the initial decision and order of the hearing examiner on remand (J.A. 99-148), and the final order and opinion of the Commission (J.A. 196-231) are not officially reported.[1]

[1] Petitioners have not included in their appendix the opinions of the Federal Trade Commission in this case, as required

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1970, and a petition for rehearing was denied on July 14, 1970. The petition for writ of certiorari was filed on September 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order of the Federal Trade Commission entered after five years of hearings, remanding the case to adduce additional evidence relevant to the corporate relationship of petitioners, violated the "reasonable time" requirement of Section 6(b) of the Administrative Procedure Act (5 U.S.C. 555(b)).

2. Whether the Commission properly included a provision in a cease and desist order, requiring petitioners' salesmen affirmatively to disclose the nature of their business at the time they approach a prospective customer.

STATUTES INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45(a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

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by Rule 23(1)(i). We are lodging with the Clerk two copies of the joint appendix before the court of appeals (J.A.), which contains these opinions.

Section 6(b) of the Administrative Procedure Act (5 U.S.C. (Supp. V) 555(b)), provides in pertinent part:

> "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

STATEMENT

Petitioners, Crowell-Collier and Macmillan, Inc. ("Crowell-Collier"), and two of its subsidiaries, P. F. Collier and Son Corporation ("Collier and Son") and P. F. Collier, Inc. ("Collier, Inc."), have been engaged in the publication and sale of various reference books, including Collier's Encyclopedia, which was introduced to the market in 1950. Petitioners' books are sold at retail to the general public through agents or salesmen who approach prospective purchasers in their homes or at their places of business. The salesmen are furnished with sales kits, various books, pamphlets, circulars, and other promotional literature, and are generally instructed in the procedures to be followed in making solicitations (J.A. 47).

The Federal Trade Commission, on January 18, 1960, issued a complaint (J.A. 4-10) against petitioners Crowell-Collier[*] and its wholly-owned subsidiary, Collier and Son, charging that the latter had engaged in unfair methods of competition and unfair and deceptive acts and practices in the door-to-door sales of Collier's Encyclopedia, in violation of Section

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[*] Prior to 1965, petitioner Crowell-Collier's name was The Crowell-Collier Publishing Company, which name appears in the complaint (J.A. 4).

5 of the Federal Trade Commission Act. The complaint charged Crowell-Collier with violating Section 5 through its control and domination of the acts and policies of Collier and Son.

The complaint alleged, *inter alia*, that petitioners, through their salesmen, falsely represented that the salesmen were conducting a market research survey; that they were connected with petitioners' advertising or publicity department and were not selling anything; that a set of Collier's Encyclopedia would be given free or at a reduced price in exchange for an agreement to purchase yearly supplements, a letter with comments on the product, and the right to use the person's name; that the annual supplement regularly sold for $10 but was being specially offered for $3.95; that this was a "special introductory offer," limited to the time of the call on the prospect; and that other benefits or advantages were available (J.A. 6-8).

Hearings before a trial examiner commenced in August 1960. In December 1960, Collier and Son was merged into its parent and Collier, Inc. was formed by Crowell-Collier to assume the business of selling encyclopedias. Collier and Son did not seek dismissal of the complaint as to it, nor did complaint counsel seek to amend the complaint to include Collier, Inc.

Hearings were held in several cities; over 100 witnesses were called and more than 200 exhibits introduced in evidence. In September 1965, the hearing examiner rendered an initial decision (J.A. 14-45) ordering the complaint dismissed. He ruled that

Crowell-Collier was not subject to a Federal Trade Commission order because it was not engaged in interstate commerce and did not control, dictate, or dominate the acts and policies of its subsidiary, Collier and Son (J.A. 44). Because Commission orders operate prospectively only, he held that none could issue against Collier and Son, since that corporation had dissolved (*ibid.*). Finally, stressing the protracted nature of the proceedings and the "staleness" of the evidence, the examiner concluded that there was "no present, specific, or substantial public interest" in continuing the proceedings (J.A. 40-44). Because of these determinations, the examiner made no findings of fact concerning the deceptive practices charged in the complaint.

On appeal by complaint counsel, the Commission vacated the initial order. It found that Collier and Son had violated the Act by "lengthy and blatant use of deception" in the sale of books, including Collier's Encyclopedia (J.A. 67-84). The Commission issued a cease and desist order enjoining petitioner Collier and Son and its "successor or assign" from committing further violations (J.A. 64-66), but stayed the effective date of the order pending a remand to a hearing examiner for further findings on two issues: (1) whether the parent, Crowell-Collier, controlled Collier and Son such that the order should be applied to it; and (2) whether Collier, Inc. was the successor cor-

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[3] The hearing examiner excluded evidence offered by Commission counsel concerning the conduct of petitioners after 1960, as well as evidence relevant to the issue whether Collier, Inc. was successor to Collier and Son (J.A. 33-35).

poration to Collier and Son, and, as such, subject to the order.

Following remand hearings, a second hearing examiner concluded that Crowell-Collier so dominated and controlled the acts and practices of Collier and Son that it should be held liable for the subsidiary's conduct, and that Collier, Inc. was in fact the successor to Collier and Son and should also be subject to the order (J.A. 99-148). The Commission adopted the findings and conclusions of the examiner, and made effective its original cease and desist order against all petitioners (J.A. 196-231).

The order directs the companies to cease and desist, *inter alia*, from:

> 3. Failing to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchasers that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise [the affirmative disclosure requirement].
>
> 4. Using any plan, scheme or ruse as a door-opener to gain admission into a prospect's home, office or other establishment, which misrepresents the true status and mission of the person making the call [the negative disclosure requirement]. [Pet. App. A4-A5, n. 6].

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[4] Two Commissioners dissented. Commissioner MacIntyre would have provided for an immediate hearing before the Commission rather than remanding to an examiner for additional evidence (J.A. 85-86). Commissioner Elman dissented without opinion (J.A. 84).

[5] The examiner who had presided at the original hearings had died in the interim.

The court of appeals unanimously affirmed the Commission's order. It held that there was substantial evidence in the record to support the findings that petitioners had violated Section 5 (Pet. App. A5-A22). The court also concluded that the remand on the issues of the corporate relationships among petitioners was appropriate; that the length of the proceedings had not destroyed the public interest in issuance of a cease and desist order (Pet. App. A22); and that the affirmative disclosure provision of that order was lawful and proper (Pet. App. A23-A24).

ARGUMENT

Petitioners challenge only two aspects of the decision of the court of appeals before this Court. They contend first that the remand to the hearing examiner, after proceedings already had taken five years, violated the requirement of Section 6(b) of the Administrative Procedure Act that agencies conclude matters presented to them within a reasonable time. 5 U.S.C. (Supp. V) 555(b). Second, they argue that the imposition of the requirement that petitioners' salesmen affirmatively disclose the nature of their business when they approach a prospective customer is arbitrary and discriminatory.

1. Petitioners do not challenge the findings, amply supported by the evidence, that they have engaged in deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Their central argument against imposition of a cease and desist order is that the Commission spent too much time reaching the decision that they had violated the Act.

Petitioners' primary focus is upon the five years during which the initial hearing was held.[6] They make no showing of prejudice as a result of the protracted proceedings nor do they demonstrate that the public interest in elimination of their deceptive practices was any less at later times.

In *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, this Court condemned practices similar to those in which petitioners engaged as "contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standard and dignity of truth." 302 U.S. at 116. Aside from general references to the "staleness" of the record (Pet. 3-7), petitioners do not suggest that their unlawful practices have been abandoned, or that changed circumstances have eliminated the need for relief. As the court below properly observed:

> The fact that this evidence may be old, *per se*, does not mean that an order issued upon it is vitiated. Where an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or resumed, it may be presumed to have been continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned * * *. [Pet. App. A21-A22.]

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[6] The hearing examiner, in the initial decision, discussed the various causes of the lengthy proceedings (J.A. 17-18). Petitioners do not challenge the conclusion of the court of appeals that "both parties * * * share responsibility for the protracted nature of the proceedings" (Pet. App. A21).

The position of petitioners appears, in essence, to be that the five-year proceeding was unreasonable as a matter of law. There is no authority, however, for the imposition of *per se* rules regarding the length of administrative proceedings in opinions of this Court criticizing their "nigh interminable" delays (*Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527; *Atlantic Refining Co.* v. *Public Service Comm.*, 360 U.S. 378, 389). Contrary to petitioners' assertions, the leading decisions in courts of appeal do not reflect differing approaches to the general problem of delay (Pet. 8), but a consistent one in which such factors as the public interest, the reasons for delay and the interest of the parties are weighed in each case. See, *e.g.*, *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 867 (C.A. 4).

The court of appeals in this case considered the various factors and correctly concluded that the public interest in enforcement outweighed any possible effect on the speed of other Commission proceedings which reversal in this case solely on grounds of its protracted nature would have.

2. Assuming an order may properly issue against them, petitioners challenge only that part which requires their salesmen affirmatively to disclose their purpose at the doorstep. They claim that this requirement discriminates against them because it has not been imposed on other companies engaged in door-to-door sales of encyclopedias.[7]

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[7] A negative disclosure requirement, see p. 6, *supra*, to which petitioners do not object has been imposed in the five cases they cite in which orders have been proposed or issued

"The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices." *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608, 611. It "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470, 473. Only where there is "patent abuse of discretion" will a court interject itself into the enforcement process. *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 414; *Federal Trade Commission* v. *Universal Rundle Corp.*, 387 U.S. 244.

The Commission's findings in this case amply justify the affirmative disclosure remedy. It "found that a principal component of the unlawful sales methods * * * involved misrepresenting the purpose of the salesman's call and deceptively failing to disclose that the caller was simply attempting to sell * * * encyclopedias" (J.A. 230). That other companies may not be subjected to the same disclosure requirements only affords, as the court of appeals pointed out, "the basis for an argument that Collier's competitors should have been dealt with likewise, not that the petitioners

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since the order in this case was initially issued in September, 1966 (Pet. 13).

Since the negative requirement precludes any but a truthful explanation of his purpose from a salesman seeking entry, the additional "affirmative" requirement will adversely affect Collier salesmen only in cases where people would admit an individual who gives no explanation but not one who discloses that he is a salesman.

should escape" (Pet. App. A23). "[T]hose caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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The Commission's recently proposed Trade Regulation Rule concerning door-to-door sales of all products whose price is greater than $10 requires affirmative disclosure by a salesman upon initial contact before any other statement is made or question asked. 35 C.F.R. 15,164, issued September 29, 1970.

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